In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 808

NATIONAL MARITIME UNION OF AMERICA, ET AL., APPELLANTS

v.

PAUL M. HERZOG, ET AL.

STATEMENT OF MATTER MAKING AGAINST JURISDICTION OF THIS COURT, PURSUANT TO RULE 12, PARAGRAPH 3

Section 9(f) of the National Labor Relations Act, as amended by the Labor Management Relations Act (61 Stat. 136) provides that the National Labor Relations Board shall make no investigation of questions raised by a labor organization unless that organization has filed copies of its constitution and by-laws and a report containing specified information and that it has also filed financial statements with the Secretary of Labor and furnished copies thereof to members of the organization. Section 9(g) provides that in order to be eligible for certification a labor organization must file such reports annually with the Secretary of Labor. Section 9(h) provides that the Board shall not make any investigation of any question concerning the representation of employees raised by a labor organization unless the officers of that organization

have filed affidavits that they are not members of the Communist Party or affiliated with it, and that they do not believe in, are not members of, or do not support any organization that believes in or teaches the overthrow of the United States Government by force or by any illegal or unconstitutional methods.

The appellant, National Maritime Union, has filed none of the above documents. The National Labor Relations Board accordingly has denied it the right to intervene in a representation proceeding and to appear on the ballot in such a proceeding. The Union thereupon brought this suit for a declaratory judgment and an injunction, alleging that paragraphs (f), (g), (h) of Section 9 are unconstitutional.

The Board agrees with the appellant that the questions relating to the constitutionality of Section 9(h), the affidavit provision, are substantial in character and present issues of great public importance in the administration of the Act. The Board believes it to be in the public interest that there be an early final determination of the constitutionality of this paragraph. The Board doubts, however, that this Court will ever reach the constitutionality of Section 9(h) in the instant case, and is of the view that the case presents no other substantial constitutional question.

This case comes to this Court by direct appeal under Section 3 of the Act of August 24, 1937, 50 Stat. 751, 28 U. S. C. sec. 380a. This Court has held on several occasions that this Section, like Section 266 of the Judicial Code, does not apply "unless the questions raised as to the constitutional validity of an Act of Congress are substantial." *Jameson & Co.* v. *Morgenthau,* 307 U. S. 171, 172; *Cali-*

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fornia Water Service Co. v. *City of Redding,* 304 U. S. 252, 254-255. It is our belief that appellants' contentions as to the unconstitutionality of Paragraphs (f) and (g) of Section 9 are devoid of substance, and that, if this is so, appellants' failure to file the documents required by those paragraphs would preclude the National Maritime Union from being allowed to participate in the Board's election irrespective of the validity of Paragraph (h). This means that if Paragraphs (f) and (g) are held constitutional appellants would not be entitled to participate in the representation proceeding and that there would be no occasion for this Court to pass upon the substantial issues of constitutionality presented by Paragraph (h).

Appellants have not contended that Congress lacks the constitutional power to impose the requirements as to statements and financial reports contained in Paragraphs (f) and (g) (see opinion below, p. 12). It is not suggested that the substantive requirements are unrelated to the objectives of the legislation or are unreasonable or unduly burdensome or that they exceed the powers conferred upon Congress by the Commerce Clause. Any such contentions with respect to the validity of informational requirements would be foreclosed by controlling decisions of this Court. *Lewis Publishing Co.* v. *Morgan,* 229 U. S. 288; *Alabama State Federation of Labor* v. *McAdory,* 325 U. S. 450, 469; *Electric Bond & Share Company* v. *Securities and Exchange Commission,* 303 U. S. 419; *Weeks* v. *United States,* 245 U. S. 618.

Appellants' sole contention as to these paragraphs is that Congress may not constitutionally require compliance with these admittedly valid requirements as a condition to permitting labor

organizations to utilize the facilities of the Board. Clearly appellants do not have any constitutional right to act as an exclusive statutory bargaining agency, for that right is derived from the National Labor Relations Act itself and Congress obviously was under no constitutional obligation to enact that statute. Indeed we do not understand appellants to claim any such right (appellants' statement, pp. 8-9). Their contention seems to be that the right to organize and function as a trade union is a basic constitutional right which Congress cannot impair by establishing a rival labor organization as the exclusive bargaining agency while denying appellants the opportunity to qualify as such agency. But appellants will not be deprived of any such right unless a majority of the employees in the bargaining unit favor another representative. If, as occurred in connection with one of the two employers involved in this case, a majority do not select another representative, a disqualified labor organization stands in no worse position than if the statute had not been passed. Certainly, if the majority of the employees select a different bargaining representative the minority union cannot assert that it has been deprived of a constitutional right. This is implicit in the doctrine of majority rule held to be constitutional in *Virginian Ry.* v. *System Federation,* 300 U. S. 515, and *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1. The disadvantage to a labor organization which does not comply with Paragraphs (f) and (g) which results from its inability to participate in the Board's representation proceeding and to be certified by the Board is not of constitutional stature. It is a detriment which flows from the organization's voluntary refusal to com-

ply with the requirements which Congress has the power to impose.

Furthermore, if Congress has the right to require labor organizations to file the specified information, it has the power to establish sanctions designed to insure compliance with the substantive requirements. The conditioning of a labor organization's right to avail itself of the advantages provided by the statute upon compliance with the informational paragraphs clearly would seem to be a permissible type of sanction. Compare *Lewis Publishing Co.* v. *Morgan, supra,* which sustains the conditioning of the second-class mailing privilege upon the furnishing of information not greatly unlike that contemplated by Section 9(f). *Hill* v. *Florida,* 325 U. S. 538, cited by appellants, held that the sanctions imposed by the Florida statute were unlawful because of their conflict with the National Labor Relations Act. This decision obviously does not mean that an amendment to the Federal statute attaching conditions to privileges of its own creation would be unconstitutional.

For the above reasons we submit that appellants' contentions as to the invalidity of Paragraphs (f) and (g) raise no substantial constitutional questions. If the Court is of the same opinion, there will be no need to consider the validity of Paragraph (h) in order to dispose of the case. For Sections 9(f) and (g) themselves require exclusion from election ballots of organizations which fail to file the material contemplated by those sections. Since appellants have admittedly not complied with these requirements, the Board's action in denying N. M. U. a place on the ballot was proper, entirely apart from any possible question concerning the validity of Section 9(h) with which appellants like-

wise failed to comply. Determination of the questions which appellants seek to raise concerning the constitutionality of Section 9(h) is thus not essential to disposition of the controversy, since, whether that provision be ultimately sustained or set aside, appellants are entitled to no relief in this proceeding. Their prayer for a declaration of unconstitutionality raises only an abstract issue to the extent that it has no effect upon the representation proceedings. It is doubtful, therefore, whether this Court will desire to consider important questions concerning the constitutionality of Section 9(h) on this appeal.

We urge, therefore, that if this Court regards the questions presented as to the constitutionality of Paragraphs (f) and (g) as lacking in substance it would be appropriate for the Court to order the appeal dismissed for lack of jurisdiction.

Respectfully submitted,

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